Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers	)	WC Docket No. 03-251

COMMENTS OF T-MOBILE USA, INC.

I. INTRODUCTION

T-Mobile USA, Inc. ("T-Mobile")[1] comments on the above-captioned Notice of Inquiry ("NOI")[2] to urge the Commission to require incumbent local exchange carriers ("ILECs") to

1 T-Mobile is an independent, nationwide commercial mobile radio service ("CMRS") carrier. T-Mobile currently serves more than 18 million customers in 46 of the top 50 U.S. Markets. T-Mobile increasingly competes with incumbent local exchange carriers ("ILECs") for customers and is a leader in deploying advanced wireless services. Via its HotSpot service, T-Mobile also provides Wi-Fi (802.11b) wireless broadband Internet access in more than 5,000 convenient public locations such as Starbucks coffeehouses, airports, and airline clubs, making it the largest carrier-owned Wi-Fi network in the world.

2 *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of Inquiry, WC Dkt 03-251, FCC 05-78, ¶ 37 (Mar. 25, 2005) ("*NOI*") (stating that this NOI addresses broader questions of anticompetitive and discriminatory behavior than the competitive analyses that the Commission has conducted under 47 U.S.C. § 251).

offer stand-alone digital subscriber loop service ("naked DSL") [3] on a cost-based, nondiscriminatory basis.

T-Mobile is one of the few remaining independent national wireless carriers, with a rapidly growing base of mass market and business customers throughout the United States. T-Mobile supports the Commission's efforts to increase consumer choice and promote innovation through free, competitive markets. As a leading provider of advanced wireless services, T-Mobile is heartened by Chairman Martin's recognition of the importance of broadband services to U.S. consumers and the U.S. economy. T-Mobile agrees with Chairman Martin that "the free market is a better way for delivering innovation to consumers."[5]

However, the refusal of many ILECs to provide DSL separately from traditional wireline voice service threatens already limited consumer choice for advanced services and, if allowed to persist, will thwart deployment of advanced wireless broadband services that T-Mobile and others seek to introduce. Narrow, targeted regulation to require ILECs to make naked DSL available to U.S. consumers is necessary in this case because the competitive marketplace is not functioning.

To safeguard and maximize consumer options in the broadband market, and fulfill its statutory duty to promote deployment of advanced wireless services,[6] the Commission should

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[3] ILECs generally offer dial-tone voice service tied to DSL. In contrast, a "naked" DSL offering from an ILEC does not include the dial-tone voice service.

[5] Drew Clark, *FCC Chief: Broadband is Top Priority*, Nat'l J. Technology Daily, May 27, 2005 ("Clark Article").

[6] *See* Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (stating that it is the policy of the United States to encourage the provision of new technologies and services to the public).

immediately begin a rulemaking proceeding to require ILECs to make cost-based stand-alone or naked DSL available to consumers on a nondiscriminatory basis.[7]

II. BUNDLING OF DSL AND VOICE SERVICES REDUCES CONSUMER CHOICE AND THWARTS DEPLOYMENT OF ADVANCED WIRELESS SERVICES

A. T-Mobile's Customers Will Need Cost-Based Broadband Connections to Realize the Benefit of New, Advanced Wireless Broadband Services

T-Mobile is assessing a number of potential new IP-based services that would compete directly with voice and other broadband offerings of wireline carriers. For these services to emerge as economically viable forms of intermodal competition, potential customers would need access to cost-based, stand-alone broadband pipes, such as naked DSL offerings.[8] Without those necessary inputs, the development of advanced IP-based services will be thwarted. Conversely, consumer demand for advanced broadband services will be enhanced if consumers have a wider variety of useful broadband applications. By requiring ILECs to provide naked DSL, the Commission has a rare opportunity to achieve two of its prime policy goals: increasing consumer choice among broadband applications and promoting innovation. The Commission should seize that opportunity now.

B. Bundling of DSL and Voice Services Threatens Intermodal and Intramodal Competition and Eliminates Options that Should Be Available to End Users

T-Mobile shares the Commission's commitment to increasing consumer choice and innovation by fostering and relying on free, open and competitive markets. But T-Mobile cannot

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[7] T-Mobile has asked the Commission to condition approval of the pending large wireline mergers on the availability of cost-based, nondiscriminatory naked DSL. *See, e.g.*, Response of T-Mobile USA, Inc., WC Dkt No. 05-75, at 22 (filed May 24, 2005). Those requests in no way diminish the need for a nationwide rule with broader industry application. All ILECs are capable of linking DSL to consumer acceptance of wireline voice service.

[8] The pricing standard for naked DSL offerings should be forward-looking economic cost.

reasonably rely on the broadband marketplace to provide such benefits until it is adequately assured that ILECs are actually competing in their provision of cost-based broadband pipes to consumers. The state of competition in the broadband marketplace, however, is not reassuring.

In particular, the refusal of many ILECs to offer naked DSL is itself a strong indication that the broadband marketplace is not competitive. Although some cable operators offer stand-alone broadband cable modem service to consumers, the availability of such service in some areas apparently does not place competitive pressures on most ILECs strong enough for them to offer naked DSL. Withholding naked DSL from the marketplace appears to be part of a misguided effort by ILECs to protect their traditional wireline dial tone service from competitive IP-based services by requiring consumers to purchase traditional voice together with DSL. Initiating a rulemaking is a vital step toward ensuring that intermodal competition occurs on a level playing field.[9]

ILECs' incentives for protectionist behavior similarly threaten intramodal competition. Because many ILECs are affiliated with wireless carriers, they will have every incentive to withhold stand-alone DSL from competitors like T-Mobile while offering broadband access freely to their wireless affiliates. Because linking of DSL and voice services is an unreasonable and discriminatory practice that seriously threatens inter- and intramodal competition, the Commission should invoke Sections 201 and 202 of the Communications Act and Section 706 of the Telecommunications Act of 1996 (or its Title I authority ancillary to those sections) to

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9 *See* Lynn Stanton, *Martin Emphasizes "Level Playing Field,"* TR Daily, June 7, 2005 (quoting Chairman Martin as stating that the FCC "needs to do all that it can . . . to try to create [a] level playing field" as services based on different technologies compete more directly).

prohibit these anticompetitive arrangements and require ILECs to offer cost-based naked DSL on a nondiscriminatory basis.[10]

T-Mobile is not aware of any technical basis for Verizon and other ILECs to refuse to provide naked DSL in a cost-based, nondiscriminatory manner.[11] Rather, the refusals and restrictions, including the restrictions contained in Verizon's recent announcement that it will provide a form of stand-alone DSL on a limited basis, appear to part of a classic anticompetitive strategy[12] Qwest, an ILEC that offers naked DSL, recently offered the following critique of Verizon's planned limited offering:

> In particular, announcements of a willingness to begin to provide stand-alone DSL are meaningless if the terms are not sufficient to allow competitive service offerings by non-Verizon VoIP providers and others.[13]

As numerous state commissions have found, combined offerings of broadband and voice services very effectively locks in narrowband voice customers such that voice service is

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10 *See, e.g.,* 47 U.S.C. § 201 (stating, among other things, that any unjust or unreasonable charge, practice, classification, or regulation in connection with communication service is unlawful), *id*. § 202 (stating, among other things, that unjust or unreasonable discrimination in such charges, practices, classifications, regulations, facilities or services in connection with communication service is unlawful). The Commission's authority under section 201(b) extends to tying arrangements. *See, e.g., AT&T Communications*, 5 FCC Rcd 3833, 3834-36 (1990) (determining that AT&T's tying customer acceptance of its SDN service to provision of 800 service violated Section 201(b)); *AT&T's Private Payphone Commission Plan*, 3 FCC Rcd 5834, 5835-37 (1988) (finding that AT&T's tying of its "1+" service to its "0+" service is an unreasonable practice under Section 201(b)).

11 To date, only Qwest among the RBOCs offers naked DSL similar to that described above, although it apparently imposes some restrictions on the offering, limiting its potential attractiveness to residential consumers.

12 Verizon has announced a very limited form of stand-alone DSL that apparently is available only to customers in the company's Northeastern region and is offered only to existing Verizon phone and DSL customers. *See* Shawn Young, *Verizon to Offer 'Stand-Alone' DSL Web Service*, Wall St. J., Apr. 19, 2005, at D2.

13 *See* Qwest Petition to Deny, WC Dkt. 05-75, at 42 (filed May 9, 2005).

insulated from competition.[14] And, as Cbeyond demonstrated in its petition to deny the Verizon-MCI merger, Verizon and other ILECs have a long history of refusing to provide DSL service in an effort to protect their own potentially competitive services.[15]

T-Mobile also is concerned that ILECs possess the ability and incentive to degrade IP-based services offered by unaffiliated firms (including voice-over-IP services ("VoIP")). In March 2005, for example, the Commission's Enforcement Bureau exercised its authority under section 201(b) of the Communications Act to enter a consent decree with Madison River Communications, LLC ("Madison River"), a rural LEC serving residential and business voice and DSL customers, based on allegations that Madison River blocked ports used for VoIP applications so that customers were unable to use VoIP through one or more VoIP service providers.[16] The Madison River incident serves as a warning to the Commission regarding ILECs' incentives to take defensive, anticompetitive measures against IP-based competitors. The Commission is to be congratulated for its prompt action in that case, and it similarly should move promptly to a rulemaking regarding naked DSL.

14 *See, e.g.*, *Complaint of Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. Regarding BellSouth's Practice of Refusing to Provide FastAccess Internet Service to Customers Who Receive Voice Service From Competitive Voice Providers, And Request for Expedited Relief*, Dkt No. 020507-TL, at 18 (Fla. PSC Nov. 20, 2003).

15 *See* Cbeyond Petition to Deny, WC Dkt No. 05-75, at 86-87 (filed May 9, 2005) ("Indeed, the RBOCs sat on DSL and related technologies for over 20 years and had no incentive to roll out the service until cable modem providers and DLECs began to offer consumer broadband…. Until then, RBOCs were content to sell T1 circuits at much higher prices").

16 *See Madison River Communications, LLC and Affiliated Cos.*, DA 05-543, ¶ 1 (Mar. 3, 2005).

III. THE COMMISSION SHOULD IMMEDIATELY START A RULEMAKING PROCEEDING TO DEVELOP A FULL RECORD AND TO ENSURE COMPETITIVE BEHAVIOR IN THE BROADBAND MARKETPLACE.

This NOI is but a first step in addressing ILECs' anticompetitive practices regarding DSL and voice services. The Commission should start a rulemaking proceeding to require ILECs to make naked DSL available to consumers on a nondiscriminatory basis in order to best realize the policy goal of widespread broadband access to American consumers.[17]

The evidence that ILECs have engaged in anticompetitive and discriminatory behavior by linking their voice services to DSL more than justifies a rulemaking proceeding. The Commission must act to stop current abuses by ILECs and to prevent potential foreclosure of consumer choice for other new technologies. Currently, ILECs apparently are free to deny broadband access to a consumer who chooses to use only a wireless phone or who desires to take advantage of new technologies like VoIP or those advanced wireless broadband services that T-Mobile hopes to deploy. Addressing these and other issues in the context of a rulemaking will send a strong pro-competitive signal to ILECs and all other broadband providers.

IV. CONCLUSION

In this era of dramatic consolidation in the wireline industry, allowing ILECs to continue to restrict availability of an input so critical to competitive deployment of advanced wireless broadband services would be a serious blow to intermodal competition. The Commission must act forcefully to ensure development of intermodal competition as an alternative to the services offered by wireline companies. To prevent further competitive abuses resulting from ILECs'

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[17] *See, e.g.*, Clark Article (statement of Chairman Martin that "broadband is critical" and "our No. 1 priority").

combined offerings of broadband and voice services, the Commission should not delay in proposing rules to require ILECs to offer naked DSL services on a cost-based, nondiscriminatory basis.

Respectfully submitted,

/s/ Thomas J. Sugrue
Thomas J. Sugrue
Vice President Governmental Affairs

/s/ Kathleen O'Brien Ham
Kathleen O'Brien Ham
Managing Director, Federal Regulatory Affairs

/s/ Jamie Hedlund
Jamie Hedlund
Senior Regulatory Counsel, Federal Regulatory Affairs
T-MOBILE USA, INC.
401 Ninth Street, N.W.
Suite 550
Washington, D.C. 20004
(202) 654-5900

Cheryl A. Tritt
William C. Beckwith
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

June 13, 2005